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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1949

No. 544

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, AND THE STATE OF WISCONSIN,
Appellants,

vs.

THE STATE OF ILLINOIS,
Appellee

STATEMENT OPPOSING JURISDICTION

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STATEMENT IN OPPOSITION TO THIS COURT'S JURISDICTION

The facts in this case fully appear from appellants' Jurisdictional Statement and from the Illinois Supreme Court's opinion. They require no amplification.

The question presented can be thus tersely stated:

> May Illinois collect, without infringing Wisconsin's sovereign immunity, an inheritance tax levied in terms upon a testamentary gift to the Regents of the University of Wisconsin, a public corporation and arm of the State of Wisconsin, the Illinois Supreme Court having held that the tax is in substance a diminution of the *quantum* of the gift before its transmission under Illinois statutes of testamentary succession to the University?

Illinois submits that this question is not substantial.

I

The Question Sought To Be Presented Is Not Substantial

Illinois' statutes rendered possible and made valid Knapp's testamentary gift to the University of Wisconsin. Illinois might have inhibited, partially or even totally, the right of Wisconsin or her University to take under Knapp's will. She might have accomplished this result, for example, by an act in the nature of a Statute of Mortmain. Therefore Illinois did far more than afford mere procedural and administrative means for protecting and dispensing Knapp's estate in accordance with his testamentary wishes, although simply providing those means would of itself almost certainly constitute a basis for the tax. *Illinois gave the testator's wishes validity by authorizing and making possible the very gift itself.* She may therefore validly require the payment of a tax as a condition precedent to the efficacy of the testator's *post mortem* beneficence.

Illinois' Inheritance Tax Act is *in pari materia* with her statutes governing descent, distribution and testation. Therefore the provisions of the taxing Act must be integrated with the provisions of the statutes last mentioned. And when it is thus integrated with such statutes, it appears that Illinois has enacted a legislative scheme under which testamentary gifts, including those to universities of sister states, are authorized but measure and are diminished *pro tanto* by a tax upon the beneficiary.

In *United States* v. *Perkins*, 163 U. S. 625, this Court held, although that case was decided when the doctrine of "reciprocal sovereign immunity" was then in full vigor, that New York might validly impose death duties measured by the value of property bequeathed or devised to the Federal gov-

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ernment. The Court declared that such a State tax was "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use * * *."

Wisconsin contends that the *Perkins* case is distinguishable from the instant case because the New York tax was an "estate tax," that is, a tax predicated upon the theory that it was the testator's right to transmit which was taxed, whereas Illinois' tax is an "inheritance tax," that is, a tax conceived as levied upon the right of the sovereign beneficiary to take. In other words, Wisconsin says that while Illinois may tax Illinois residents *post mortem* for the privilege of leaving their property to Wisconsin, she may not in terms lay the tax upon Wisconsin instead of upon the Illinois decedent's estate.

In the first place, this is, for all purposes relevant here, a distinction of form and not of substance. No such *tour de force* of terms will defeat so vital and so highly pragmatic a State function as the taxing power. (Cf. *Gregory* v. *Helvering*, 293 U. S. 465; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331.) But even if substantial reality must be given for some purposes to the conceptual distinction between a tax upon the power to devise and a tax upon the right to take under a devise, the distinction would not be important here; for either the testator's power or the devisee's right is properly the subject of a tax when it is Illinois law that made the gift possible.

Moreover, the Illinois Supreme Court's decision, which is of course authoritative here, has expounded Illinois' Inheritance Tax Act as a diminution of the *quantum* of the gift to gifts *before* transmission of that gift to that State under Illinois law of testamentary succession. Thus the Illinois Court's construction of the act in question in the

instant case assimilates it for constitutional purposes to an estate, not an inheritance tax.

While the Attorney General of Illinois sought no such declaration from the Supreme Court of Illinois, taking the position in that Court that it made no difference whether the gift to Wisconsin was viewed as that of the residuary estate minus the tax or was a gift to the whole estate subject to the tax, the Illinois Supreme Court has seen fit *sua sponte* to treat the Illinois Statute as imposing an estate tax, not an inheritance tax, for all purposes relevant in this case.

Therefore we submit this case presents no substantial Federal question, wherefore the present appeal should be dismissed.

Respectfully submitted,

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